IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 372/2005

1. M/s. Colfax (India) Pvt. Ltd.,
(formerly known as M/s. Colfax
Laboratories (India) Limited,
a Company incorporated under
the Companies Act, 1956 having
its Registered Office at CMM Building,
Rua da Ourem, Panjim, Goa 403 001.

2. Mr. Eric Menezes,
being the Managing Director and
Shareholder of Petitioner No.1 abovenamed
residing at Altinho, Mapusa, Goa. ..... Petitioners.

V/s.

1. The State of Goa,
through the Finance Secretary,
Secretariat, Panaji, Goa.

2. The Commissioner of
State Excise, Government of Goa,
Panaji, Goa.

3. The Excise Inspector,
In-charge Colfax Laboratories (India),
Ponda, Goa. ..... Respondents.

Mr. A. Hidayatullah, Senior Counsel with Mr. A. N. S. Nadkarni, Mr. S. M. Singbal and Mr. H. D. Naik, Advocates for the petitioners.

Mr. M.S. Usgaonkar, Senior Advocate with Mr. Sanjay Sardessai, Advocate for the respondents No.2 and 3.

CORAM : R.S. MOHITE &
N.A. BRITTO, JJ

DATE : AUGUST 14, 2007.

J U D G M E N T : (Per MOHITE, J.)

This petition is filed by M/s. Colfax (India) Pvt. Limited (hereinafter referred to as "the petitioners") against an order dated 11.6.05 passed by the Excise Inspector, Incharge, M/s. Colfex Laboratories (India) Pvt. Ltd., confirming a demand of Rs.29,21,59,143/- from the petitioners being the excise duty payable by the by the petitioners for the period 9.9.91 to 17.8.98 and directing the petitioners to pay the said amount.

2. The present petition has a chequered history which will have to be narrated, as it would be necessary to decide some of the points which have been raised in the petition.

3. A brief chronology of facts which gives rise to the filing of this petition, is as follows :

(a) On 15.4.1968, the petitioners were granted a licence for manufacture of various types of cosmetics, including an after shave lotion to be marketed under the trade mark "Old Spice".

(b) On 1.4.1969, the petitioners were granted a further licence under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 for

manufacture of "Old Spice" as a toilet preparation.

(c) Till the end of 1984, the petitioners paid excise duty on "Old Spice" after shave lotion on the basis that it was a toilet preparation.

(d) On 14.1.85, the petitioners moved an application before the Commissioner of Excise, Government of Goa for reclassification of Old Spice after shave lotion as a "medicinal preparation" falling under tariff Item No.1(i)(b) in the Schedule to the Act, for the purpose of levy of excise duty.

(e) By his Order dated 23.3.85, the Excise Commissioner declared Old Spice as "medicinal preparation" and by a further order dated 12.6.85, he classified Old Spice as falling within the ambit of item No.1(i)(b) of the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Upon such orders being passed by the Excise Commissioner, the petitioners made an application for refund of excess excise duty paid after 23.3.1985, which was allowed by various orders dated 26.8.95, 27.11.85 and 27.12.85, passed by the then State Excise Commissioner.

(f) On 14.1.89, another company by name M/s. PJM Pharmaceuticals Pvt. Ltd., moved an application before the Drugs Controller, Government of Goa for manufacture of some cosmetic products, including an after shave lotion to be marketed under the trade name "Blue Stratos" and which was to be manufactured under a loan licence granted by the petitioners. This application was approved and a licence to manufacture

was accordingly issued on 13.2.89.

(g) On 3.10.89, the Superintendent of Excise addressed a letter to the petitioners informing them that pursuant to their application dated 15.9.89 to the Commissioner of Excise had approved the price of their products as prescribed in the letter with effect from 15.9.89. In this letter, seven variants of Old Spice after shave were mentioned. This letter of approval indicated a price inclusive of duty in respect of the 7 variants of "Old Spice" (emphasis provided).

(h) By a further letter dated 12.10.89 issued by the Excise Officer and addressed to M/s. PJM Pharmaceuticals Pvt. Ltd., the said M/s. PJM Pharmaceuticals were informed that in pursuance of their application dated 5.10.89, the Commissioner of Excise had approved the price of the fair products as described in the letter with effect from 9.10.89. The four products as described in the said letter were four variants of "Blue Stratos" which was an after shave lotion for men. The letter indicated the approval of price inclusive of duty in respect of the 4 variants of "Blue Stratos" (emphasis provided).

(i) On 13.3.1991, the Commissioner of Excise, Government of Goa issued a notice under Section 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 stating that it had been discovered that the petitioners as well as M/s. PJM Pharmaceuticals Pvt. Ltd., had

wrongly represented to his Office in their various applications that the rate of duty payable on Blue Statos products was Rs.10/- per proof litre only and due to inadvertence the Excise Authority had accepted the said misrepresentation and consequently, the duty had been wrongly calculated. It was further stated that the amount of duty short levied amounted to Rs.92,43,684-08 and, therefore, the petitioners were called upon to pay this amount within one month of the date of receipt of this notice. A copy of this notice was also sent to M/s. PJM Pharmaceuticals Pvt. Ltd. The notice contained an Annexure indicating the manner in which the demand pertaining to short duty had been calculated.

(j) On the same day i.e. on 13.3.1991, the Excise Inspector, Ponda Taluka issued another letter to the petitioners informing that he had been directed by the Commissioner of Excise, Panaji to charge, with immediate effect the Excise Duty at the rate of 100 % ad valorem as prescribed by the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the Rules made thereunder. The petitioners were called upon to pay the excise duty at the rate of 100 % on all the products of Old Spice and Blue Stratos after shave lotions. The petitioners challenged the aforesaid demand notice dated 13.3.91 by filing a Writ Petition No. 109/91 before this Court. However, they could not obtain any interim relief in the said petition.

(k) During the pendency of the Writ Petition No.109/91, on

15.5.1991, the Commissioner of Excise issued another demand notice under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. By this demand notice also, in respect of the product Old Spice, short duty amounting Rs.17,77,18,361-20 was demanded from the petitioners. The Annexure to the notice indicated the calculations on the basis of which the demand was raised.

(l) By a Judgment and Order dated 22.8.91, a Division Bench of this Court finally disposed off the Writ Petition No.109/91 filed against the impugned demand notice dated 13.3.91. In this Judgment and Order, the Division Bench issued various directions, and it was held that the demand notice dated 13.3.91 was required to be treated as show cause notice to the petitioners. The petitioners were permitted to file their reply and it was directed that a final decision should be taken by the Excise Authorities after a personal hearing and by a speaking order. It was further directed that till a final decision was rendered, the respondents should defer the recovery pursuant to Exhibits M and N to the petition to the extent that they related to the demand of duty in excess of what had been levied, immediately prior to the issue of notice. It was, however, clarified that if, ultimately, the added liability was cast on the petitioners, as a result of the adjudication of the issue, the petitioners would be liable to pay the entirety of such liability, notwithstanding the intervening interim facility that was accorded under that

Judgment. The petitioners were also granted liberty to challenge the ultimate order of the Excise Authorities in case it was found to be adverse to the petitioners.

(m) In the meanwhile, the petitioners had also filed another writ petition being Writ Petition No. 351/91, impugning the further demand notice dated 15.5.91. In view of the judgment passed in the earlier Writ Petition No.109/91, this writ petition was also disposed off in terms of the minutes of order dated 24.9.91. These minutes of order also provided that the demand notice dated 15.5.91 would be treated as a show cause notice and the petitioners would be entitled to file a reply and the Excise Authorities would be entitled to take a final decision within a period of four weeks, after giving personal hearing. It was provided in the Minutes that till the final decision was rendered, the Government would defer the recovery pursuant to the Exhibits Q and R to the Writ Petition. It may be stated here that under the Judgment of this Court dated 22.8.91 and the order in terms of minutes, passed by this Court on 23.9.91, what was, inter alia, deferred was the recovery pursuant to the order of the Excise Officer dated 13.3.91, which related to payment of future excise duty at the rate of 100 % ad valorem.

(n) On 7.11.1991, The Excise Commissioner, State of Goa passed two orders dated 7.11.1991, finally disposing off the demand notices dated 13.3.91 and 15.5.91 along with supplementary memorandums issued by him

on 6.9.1991 and 30.9.1991, inter alia, holding that the two demand notices were substantially barred by limitation and further holding that the correct classification of the two after shave lotions was required to be determined by a Standing Committee under Rule 68 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956.

(o) On 4.2.1992, the Finance Secretary, Goa preferred two appeals under Rule 127 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 before the Chief Secretary, Government of Goa against the two orders dated 7.9.91 referred to hereinabove and on receipt of these appeals being Appeal No. 1/91 and 2/91, on 16.2.1992, the Chief Secretary issued a notice calling for a hearing of the appeals on 14.2.1992.

(p) During the pendency of those appeals, on 20.2.1992, the petitioners Company filed Writ Petition No.84/92 in this Court impugning the order dated 7.11.1991. It appears that the petitioners Company filed this writ petition as they were aggrieved by the findings of the Excise Commissioner to the effect that the correct classification of the after shave lotion was required to be determined by the Standing Committee under Rule 68 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956.

(q) Pending the hearing and disposal of the Writ Petition No.84/92, an affidavit dated 9.4.94 affirmed by the Excise Commissioner, State of Goa came to be filed in the said writ petition. Annexed to the said

affidavit, were two invoices of the petitioner-Company which, according to the Excise Commissioner, indicated that the Company was actually charging their customers excise duty at the rate of 100 % ad valorem value. It was contended in this affidavit that after collecting excise duty at the rate of 100 % from their customers and showing the same as a component of sale price, the amount that was actually being paid to the Excise Department was Rs.10/- per litre of pure alcohol content. It was prayed in this affidavit that the petitioners should be directed to deposit the differential amount in the Court in the interest of securing public revenue and preventing unjust enrichment.

(r) The Writ Petition No.84/92 was disposed off by a Judgment and Order passed by a Division Bench of this Court on 22.12.1994. By the said Judgment and Order, the petition filed by the petitioners was allowed, the two impugned orders dated 7.11.1991 were quashed and set aside and the Excise Commissioner was directed to decide the case afresh in the light of the observations made in the Judgment wherein it was observed that the Excise Commissioner was the 'Competent Authority' to decide all issues including the issue of classification in accordance with law. It was directed that the Excise Commissioner should pass a final order, after giving adequate opportunity of hearing to the petitioners. In the body of that Judgment, a

reference was made to the aforesaid contentions of the Excise Department that the petitioners were recovering duty at the rate of 100 % ad valorem from their customers, though they were actually paying a duty at the rate of Rs.10/- per proof litre on the basis that their product was a medicinal preparation. It was observed that an interim direction was sought against the petitioners to deposit the excess amount so collected, in the Court. It was mentioned that the Counsel for the petitioners had strongly refuted the allegations made by the respondents and had contended that the break up shown in the sale invoices was only a notional break up and that the petitioners were not actually recovering the excise duty at the rate of 100 % ad valorem, as alleged by the respondents. It was observed that the Court did not wish to express any opinion on this controversy since it was for the Excise Commissioner to decide this question. It was, however, made clear that the break up shown by the petitioners being only a notional break up as per their own contentions, therefore, in case the Excise Commissioner came to the conclusion that the classification submitted by the petitioners was wrong and that the petitioners' product was liable to be taxed as a toilet preparation, the Excise Commissioner should ignore this notional break up and levy the duty in accordance with the provisions of the Act. The question of limitation was also kept open to be decided by the Excise Commissioner.

(s) On 17/8/1995, fresh proceedings commenced before the

Commissioner of Excise and this ultimately culminated in the passing of an order dated 12.8.1998, by the State Excise Commissioner, Government of Goa. By this order dated 12.8.98, the State Excise Commissioner classified "Old Spice" and "Blue Stratos" as "toilet preparations", confirmed the demand made in the notices dated 13.3.91 and 15.5.1991 and directed the petitioners to pay the duty for the period beyond that covered by the said notices till 1.6.98 at the rate of 100 % ad valorem and from 2.6.1998 at the rate of 50 % ad valorem, the reduction of the rate being on account of an amendment in the Schedule.

(t) On 2/9/1998, the petitioners filed a writ petition being Writ Petition No.337/98 impugning the aforesaid order dated 12.8.98 passed by the Excise Commissioner.

(u) On 15.9.1998, an interim order was passed in the Writ Petition No. 337/98 directing the petitioners to deposit Rs.7.5 crores and to furnish a Bank Guarantee for Rs.11.20 lakhs. Liberty was given to the Excise Authorities to issue notices in connection with the alleged duty liability for the period beyond that covered by the show cause notices dated 13.3.91 and 15.5.91, subject to the rights of the petitioners to contest the validity of the same. In view of the directions given, stay of the impugned order dated

12.8.98 was granted in terms of prayer (d) of the said petition.

(v) During the pendency of the Writ Petition No.337/98, on 10.2.99, the Excise Inspector issued notices to the Petitioners, calling upon them to show cause as to why the duty for the period 9.9.91 to 17.8.98 totally amounting to Rs.29,21,59,143/- should not be recovered from them. The petitioners did show cause by their representation dated 24.2.99

(w) By its Judgment dated 1.4.99, a Division Bench of this Court, disposed off the Writ Petition No.337/98, holding that the two after shave lotions were correctly classified as "toilet preparations". This Court further held that the Rule 11 and not Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 was attracted to the demand notices. This Court directed the Excise Authorities to calculate the differential excise duty accordingly, based upon the Judgment of the Apex Court in the case of ***Government of India vs. MRF Tyres Limited.***

(x) On 12.7.1999 both, the petitioners as well as the State of Goa filed S.L.Ps. bearing No. 11418 of 1999 and 10982 of 1999, impugning the aforesaid Judgment and Order dated 1.4.1999 passed in Writ Petition No.337/98.

(y) On 10.9.1999, the State Excise Inspector after giving the petitioners a personal hearing on 12.8.99 and 23.8.99, passed an order confirming the demand contained in the show cause notice dated 10.2.1999 and directing the petitioners to pay amount of Rs.29,21,59,143/- as per notice dated 10.2.1999, on or before 27th September, 1999.

(z) Being aggrieved by the order dated 10.9.99, the petitioners filed Writ Petition No.324/99 in this Court.

(za)On 13.1.2000, the Apex Court granted leave in SLPs No. 11418 of 1999 and 10982 of 1999. As a consequence, the SLPs filed by the petitioners was renumbered as Civil Appeal No.415/2000 and the appeal filed by the State of Goa was numbered as 414/2000. Hearing of the appeals was expedited. However, the Apex Court rejected the stay applications.

(zb) On 28.11.2000, the Government of Goa invoked recovery proceedings through the Mamlatdar for recovery of the arrears of State Excise Duty, amounting to Rs.29.21,59,143/-.

(zc) By order dated 20.12.2000, the State Excise Department permitted the petitioners to restart their operations, subject to the company

depositing 100 % invoice value and 50 % excise duty before removal of the goods from the factory.

(zd) By a Judgment and Order dated 29.10.2003 passed in Civil Appeals 414/2000 and 415/2000, the Apex Court disposed off the said appeals, inter alia, confirming that "Old Spice" and "Blue Stratos" were both toilet preparations and not medicinal preparations. On the question of limitation, the Apex Court held that Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 and not Rule 11, would be applicable to the two demand notices as Rule 11 applied only when duties or charge had been short-levied through inadvertence, error, collusion or misconstruction on the part of an Excise Officer, or through mis-statement as to the quantity or description of such goods on the part of the owner. They held that this requirement did not exist as after the Order dated 23.3.1985 had been passed by the Commissioner of Excise, Goa, the concerned Excise Officer who made the relevant entries in Form A.R.-2 could not have taken a different view and had to proceed on the footing that the after shave lotions were a medicinal preparation. They held that being a subordinate officer, he was fully bound by the order of the highest excise authority and, therefore, the duties or charge could not be said to have been short-levied through inadvertence, error, collusion or misconstruction on the part of the concerned excise Officer or through misstatement as to the quantity or description of

such goods on the part of the owner. As regards the quantification of the duties done by the Excise Commissioner, the Apex Court accepted the contention of the learned Senior Counsel for the petitioners that in case the product had cum-duty price, the assessment was required to be done on the basis of wholesale price and that excise duty payable would be as provided under Section 4(4)(d)(ii)of the Central Excise Act, 1944. They observed this Court had placed reliance on the case of ***Government of India vs. Madras Rubber Factory, 1975(77) ELT.433*** for computation of assessable value on a cum-duty price. They accepted the finding of this Court that the phrase "ad valorem" appearing in the column "rate of duty" in the Schedule appended to the Act refers to the value of the excisable goods and, therefore, it will have to be worked out by applying the formula as laid down in Section 4(4)(d) of the Central Excise Act. They held that the view taken by this court was correct and called for no interference. In the result, the Apex Court partly dismissed the petitioners' appeal and allowed the appeal filed by the State of Goa. It was held that the government would be entitled to recover the entire amount of duty which had been short-levied in accordance with the order of the Excise Commissioner dated 12.8.98.

(ze) The petitioners filed a review petition before the Apex Court and the review petition was also rejected by the Judgment of the Apex

Court dated 22.1.2004, thus putting an end to the litigation pertaining to the demand of short levied excise duty for the products and periods mentioned in the demand notices dated 13.3.91 and 15.5.91.

(zf) By a Judgment and Order dated 3.11.2004, a Division Bench of this court partly allowed Writ Petition No.324/99. In its Judgment, on the question of limitation, the Court recorded a concession made by the Counsel for the petitioners to the effect that the demand notice dated 10.2.99 could be treated as having been issued under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 and held that the calculation of excise duty will have to be redone. After referring to the contentions of both sides, this Court concluded that the order impugned in the Writ Petition i.e. the order of the Excise Commissioner dated 10.9.99 was silent on the issue of cum-duty price and the applicability of the formula set out in the Judgment of this Court delivered in Writ Petition No.337/98. No reasons had been given as to why the same formula could not be adopted though it has been stated that as per the Orders passed by this Court in Writ Petitions No.109/91 and 84/1992 the petitioners were aware of their ultimate liability in the products to be classified as toilet preparations. It was held that this reasoning did not suffice the legal requirements. The Court observed that they were not impressed with the contentions of the petitioners that the quantification was also required to be undertaken by following the same

formula suo motu. It was directed that the petitioners will have to appear before the appropriate authority and on the basis of the record that may be available with them, the issue of cum-duty price will have to be settled. In the result, this court allowed the writ petition partly and quashed and set aside the impugned order only on the point of quantification. The Excise Inspector was directed to requantify the excise duty on the basis of the documents that the petitioners would submit before him, so as to ascertain whether the dispatches were done by showing cum-duty price or to work out the wholesale price with cum-duty, so as to adopt the formula devised in the case of **Government of India vs. Madras Rubber Factory** for determining a final liability of the petitioners Company in respect of the period covered by the notice dated 10.2.1999. The Excise Authorities were directed to adjudicate the issue of quantification within a period of three moths.

(zg) That after the Judgment of this Court, on 13.12.2004, the petitioners addressed a letter to the State Excise Inspector further referring to the directions contained in the Judgment of this Court dated 3.11.2004 and submitted their working of excise duty short paid which, were, according to them, was as per Annexure I to the said letter. They submitted that the duty workings were based upon cum-duty price of the after shave lotion at the time of removal of the same from the factory. It was stated that they had arrived at the cum-duty price considering the value as shown in the State Excise Stock

Register and the actual duty paid. A sample page from the said State Excise Stock Register was attached as Annexure II to this letter. It was contended in the said letter that the documents annexed explained and detailed the clearances made on the day today basis from 1991 to 1998. The letter referred to the formula laid down by the Apex Court in the case of ***Government of India vs. Madras Rubber Factory*** giving a illustration as to how the said formula was to be applied in a hypothetical situation. A letter of Government of Goa dated 18.12.2000 was annexed as Annexure III and it was stated that pursuant to the said letter the Company had paid an amount of Rs.7,88,74,060/-. It was stated that the documents on which they would like to rely were AR-2 forms and the Company's State Excise stock Register. They intimated to the Excise Officer that if the Excise Officer wanted any other document, he could request for the same.

(zh)On 11.6.2005, the Excise Inspector passed the impugned order. In the order it was stated that the show cause notice dated 10.2.99, referred to short paid excise duty corresponding to 3 periods, which were as follows :

(a) 9.9.1991 to 6.5.1995;
(b) 7.5.1995 to 1.6.1998; and
(c) 2.6.1998 to 17.8.1998.

It briefly recorded the history of the litigation, opportunity given to the

petitioners before passing of the impugned order and the contentions as contained in the petitioners' letter dated 13.12.2004. The Excise Inspector then examined how the mechanism under Section 4 of the Central Excise Act operates and concluded that the term "value" for the purpose of clause 4(4)(d)(ii) of the Central Excise Act did not include the amount of the duty of excise, sales tax and other taxes. That in ordinary cases, therefore, under the Central Excise Act, there was no cum-duty price because the original value did not include duty. He, however, observed that there may be cases where there existed cum-duty price i.e. when the price was worked before the assessment of the duty. There could be cases where, before the assessment of the duty, dutiable goods were removed from the factory and in such cases, at the time of assessment, the price became cum-duty price in cases where ad valorem duty was payable. That in ordinary cases, therefore, there was no cum-duty price because duty always stood excluded. He referred to extract from the Judgment of the Apex Court in the MRF's case and stated that the narrow question for inquiry was as to whether the assessees were able to establish that the price shown by them was a cum-duty price. He also relied upon the extracts from the Judgment of this Court in Writ Petition No. 109/91 and Writ Petition No.84/92 and concluded that the petitioners were fully aware that as per the orders passed by this Court in the aforesaid writ petitions, the liability to the payment of excise duty at 100 % ad valorem

could be cast if it was ultimately held that the classification of the subject products was made as toilet preparations. He thus concluded that it was not possible to apply the formula suggested by the assessee in their letter dated 13.12.2004. He mentioned that the assessee has relied upon AR-2 forms and that the question of indication of value came into picture when product was classified as a toilet preparation. He observed that the Department had inspected all the invoices before issuing the show cause notice and this fact had not been disputed by the petitioners. The petitioners had, however, expressed inability to produce the record for the period after 1995 as the CBI had taken them away in a raid. He noted that in the show cause notice dated 10.2.99 there were three annexures which indicated a calculation based on invoices. That it was evident from the invoices that for the first period (i.e. 9.9.91 to 6.5.95) there was an entry indicating that the excise duty declared on invoices was 100 % ad valorem. That the value of the articles was shown in one of the columns and the levy of excise duty at 100 % was separately shown in another column. In short, it was held that the calculation of 100 % excise duty on the value as shown on the invoices was correctly made. The order proceeded on the basis that the petitioners had not shown that their price was cum-duty price and this being an ordinary case of goods being sold on a normal price (ex-cum duty), the question of applicability the formula as laid down by the apex Court for calculating the excisable value from a cum-

duty price did not arise.

(zi) As stated hereinabove, being aggrieved by the aforesaid impugned order dated 11.6.05, the petitioners filed the present petition on 9.9.05.

4. On behalf of the respondents No.2 and 3, affidavit in reply, affirmed by Mr. Damodar R. Prabhudessai, Excise Inspector on 26.9.05, came to be filed. On behalf of the State of Goa a detailed affidavit in reply dated 12.3.04 came to be filed. This affidavit annexed several documents, including documents which had been filed earlier in this litigation. The petitioners filed a rejoinder dated 19.10.05. During the course of hearing of this petition, the petitioners have filed written synopsis dated 18.6.07. Both the parties have filed propositions and replies to the propositions. The petitioners filed a further affidavit dated 24.1.07 and this was replied to by Mr. Ajit Srivastava, Commissioner of Commercial Taxes, holding charge of Commissioner of excise vide his Affidavit dated 31st July, 2007. That is how the record in the present petition stands.

5. We have heard both sides. Though elaborate propositions have been submitted by both sides, in our view, the four basic questions that are required to be decided in this writ petition are as follows :

(1) Whether the written demand in respect of the duty-short levied, is hit by the law of limitation, as not having been made within six months from the date of which the duty was paid or adjusted in the owner's account-current, as per the requirement of Rule 11 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 ?

(2) In case the written demand is held not to be governed by Rule 11, but by Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, is the written demand bad in law for the reason of it being made after an unreasonable period of time ?

(3) Is the petition liable to be dismissed as the petitioners have indulged in approbating and reprobating ?

(4) What is the correct method of computing the quantum of excise duty payable in the present case; and whether the demand as made by the Excise Authorities is based on a correct method for evaluating the quantum of duty payable ?

6. We will first deal with the first two issues, since limitations are matters and the legal requirements of acting with reasonable despatch which goes to the root of the demand made.

In this connection, on behalf of the petitioners, it was contended that the issue of limitation could be re-raised, notwithstanding the fact that the Counsel for the petitioners, in the course of hearing of the earlier Writ Petition No.324/99 had conceded that the demand notice dated 10.2.99 would have to be treated as having been issued under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Reliance was placed upon a Judgment of a Single Judge of the Lahore High Court in the case of ***Fateh Ali and ors. vs. Ahmad Din***, reported in AIR 1927 Lahore 284. In that case, in the first appellate Court, the Counsel for the defendant had admitted before the District Judge that the suit had been filed by the original plaintiff within time. The question of limitation was re-raised in a second appeal before the Lahore High Court and the Lahore High Court concluded that the admission by the Counsel on a question of law i.e. abut the suit being within the period of limitation could not bind his client.

Another Judgment, relied upon by the Counsel for the petitioners, is a Judgment of a Single Judge also of Lahore Court in the case of P***anna Lal Jain vs. Jain Bank of India Ltd.,*** reported in AIR 1938 Lahore 368. In that case, a bank by name Jain Bank of India Ltd., was directed to be wound

up by an order of the High Court in 1928. The list of contributories was settled and an order directing payment was passed against the appellant before the High Court. In due course, warrant of attachment of his property was issued in the execution proceedings, which was challenged in the execution proceedings on several grounds, including the ground of limitation. At the stage of hearing of the execution application, on the question of limitation, the Counsel for the appellant (before the High Court) waived the objection regarding limitation. The other two issues were decided against the said appellant and the attachment was confirmed. In the appeal before the High Court, it was contended by the respondent that the Counsel for the appellant having waived the objection in the lower Court, the appellant was estopped from raising the said objection. The Lahore High Court held that there was no estoppel and the Counsel's admission on a point of law was not binding. It was then contended that the point of limitation should be held to have been decided against the appellant by rule of constructive *res judicata.* This plea was also turned down by the Lahore High Court. To counter these submissions, the Advocate for the respondents relied upon a Judgment of the Privy Council in the case of ***Raja of Ramnad vs. Velusami and others,*** reported in AIR 1921 Privy Council 23. In this case, the plaintiff obtained a money decree. The Judgment-debtor made no payment and, therefore, an application for execution was filed. The appellant before the

Privy Council purchased the Decree and made an application in the execution proceedings, to be brought on record as assignee of the decree and sought to execute the decree. This was resisted, inter alia, on the ground that the right to execute the decree was barred by limitation. The Court while deciding the execution application held that the transfer of the decree in favour of the petitioner before him was valid and allowed the said petitioner to execute the decree. Later on, one of the defendants applied for a review and re-raised the question of limitation. The Privy Council held that the issue of the execution of the decree being barred by limitation was in fact raised before the lower Court and as the Judge at the time of passing of his order was aware of it and that his decision (though silent on the plea of limitation) included (as legally must have been the case), the rejection of this plea. An opinion was further expressed in the Judgment that once this plea was rejected, it was not open to the Judge to admit the same plea of limitation on a subsequent occasion. That no appeal was brought against the order in which a plea of limitation must be deemed to have been rejected and it stood as binding to the parties. It appears that in this case, there was no concession made before the subordinate judge before whom the execution proceedings were pending. The fact that the plea of limitation had been raised and had been pressed was very much in the Judges' mind. He chose not to make any observation in his Judgment. This situation would be

different from a case where a concession is made by a Counsel. In such a situation, obviously, there is no occasion to give a decision on merits. We must conclude that even though there is no legal bar to reraise a point of law such as limitation claimed to be wrongly conceded by a Counsel in an earlier proceedings. We, therefore, choose to deal with the contentions raised pertaining to the limitation and unreasonable delay on their respective merits.

7. It is contended on behalf of the petitioners that the written demand dated 10/9/99 attracted limitation as contemplated in Rule 11 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. This demand pertained to the short-levy of excise duty during the period 9.9.91 to 17.8.98. That during this period, the excise duty albeit at lower rate than demanded was being paid and in the circumstances, the written demand made by the Excise Inspector was made beyond the period of six months from the date on which the duty was paid or adjusted in the owner's account-current. In order to appreciate this contention, the provision of Rule 11 needs to be reproduced and the same is as under :

> **" 11. Recovery of duties or charges short-levied or erroneously refunded. - When duties or charges have been short-levied through inadvertence, error, collusion or mis-construction on the part of an Excise Officer, or through mis-statement as to the quantity or description of such goods on the part of**

> **the owner, or when any such duty or charge, after having been levied, has been, owning to any such cause erroneously refunded the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund."**

On a bare perusal of the rule, it is clear that the said rule applies only when a duty has been short-levied through inadvertence, error, collusion or mis-construction on the part of the Excise Officer or through mis-statement as to the quantity or description of such goods on the part of the owner. It is seen from the record that the legal challenge to the earlier demand notices dated 13.3.91 and 15.5.91 was carried upto the Apex Court. The very same contention relating to the applicability of the limitation clause as contained in Rule 11 was also raised and was finally adjudicated by the Apex Court. The Apex Court, vide its Judgment and Order dated 29.10.2003, negatived this contention raised by the petitioners in respect of the demand notices dated 13.3.91 and 15.5.91 and expressly held that these notices were not governed by Rule 11, but were in fact governed by Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, which did not contain any clause of limitation. In para 18 of the Judgment, the Apex Court observed as under :

> "1**8. Rule 11 of the rules will apply when duties or charge have been short levied through inadvertence,**

error, collusion or misconstruction on the part of an excise officer or through misstatement as to the quantity or description of such goods on the part of the owner. After the order dated 23.3.1985 had been passed by the Commissioner of Excise, Goa, the concerned Excise Officer who made the relevant entries in Form A.R.-2 submitted by Colfax could not have taken a different view and had to proceed on the following footing that ASL was a medicinal preparation. Being a subordinate officer he was fully bound by the order of the highest Excise Authority of the State. Thereafter, till 1991 when notices were issued and the matter was finally decided by the Excise Commissioner, he had to proceed treating the ASL as medicinal preparation. In the fact situation, the concerned Excise Officer who made entries in Form AR-12 will be the Excise Officer for the purposes of Rule 11 and 12 as the matter was not dealt with by any other authority. In such circumstances, it cannot be held that the duties or charge had been short levied through inadvertence, error, collusion or misconstruction on the part of concerned Excise Officer or through misstatement as to the quantity or description of such goods on the part o the owner. Collusion means a secret agreement for a fraudulent purpose or a secret or dishonest arrangement in fraud of the right of another. It is deceitful agreement between two or more persons for some evil purpose such as to defraud a third person of his rights. The concerned Excise Officer who made the relevant entries in Form AR-2 and cleared the goods at the spot being a subordinate officer had absolutely no option but to act in accordance with the order dated 23.3.1985 of the Commissioner of Excise. In these circumstances, Rule 11 of the Rules can have no application to the fact of the case. Rule 12 confers a residuary power for recovery of sums due to Government. It provides that where the Rules do not make any specific provision for the collection of any duty or of any deficiency in duty, if the duty has, for any reason, been short levied or of any other some of any kind payable to the collecting Government under the

> **Act or the Rules, such duty, deficiency in duty or sum shall, on written demand made by the appropriate officer be paid to such person and at such time and place the proper officer may specify. There being no specific provision for a case like the present one for collection of any duty, which has been short levied, the provisions of Rule 12 of the Rules will be applicable. There is no period of limitation prescribed under Rule 12."**

8. The Counsel appearing for the petitioners, however, submitted that the observations made by the Apex Court must be restricted to the demand notices dated 13.3.1991 and 15.5.1991 which were the subject-matter before the Apex Court. It is their contention that the applicability of Rule 11 to the demand notice dated 10.9.99 must be tested independently. In our view, however, if the interpretation placed on Rule 11 by the Apex Court is applied in respect of the demand notice dated 10.9.99, the only conclusion that can be arrived at is that Rule 11 would not govern the said demand notice. The Apex Court held that Rule 11 was not applicable to the demand notices dated 13.3.91 and 15.5.91 because when these notices were issued, the order dated 23.3.85 passed by the Excise Commissioner holding that the after shave lotions were medicinal preparations was in force. The Excise Officer who was the subordinate officer was duty bound to follow the said order and, therefore, it could not be said that the short duty had been levied by him through inadvertence, error, collusion or misconstruction. It is nobody's case that the duty was short-levied through misstatement as to the quantity or

description of such goods on the part of the owner. We are clear in our mind that misclassification of the goods would not amount to a wrongful description of such goods which have always been described as after shave lotions. The record clearly shows that the said order dated 23.3.85 passed by the Excise Commissioner, after a chequered litigation was finally set aside by an order dated 12.8.98 wherein the State Excise Commissioner finally held that after shave lotions were "toilet preparations". The show cause notice dated 10.2.99 was thereafter issued after obtaining liberty from this Court vide its Order dated 15.9.98 and after considering the petitioners' written representation, the demand notice dated 10.9.99 was issued. From these facts, it is clear that the order dated 23.3.85 holding that after shave lotions were "medicinal preparations", remained in full force till 12.8.98. During this period, the Excise Officer could not have levied the excise duty on the footing that after shave lotions were toilet preparations. Apart from this, under two orders passed by this Court i.e. the order dated 22.8.91 in Writ Petition No.**109/91** and the order dated 23.9.91, passed in Writ Petition No.**357/91**, this Court deferred the demands of excise duty in excess of what had been levied immediately prior to the issue of notice till final decision, after remand. Orders of the Excise Commissioner demanding future excise duty at rate of 100 % ad valorem basis were thus rendered unenforceable. This final decision given on 7.11.1991, but was set aside by the Judgment of

this Court dated 22.12.1994 in Writ Petition No.84/92 and the matter was again remanded for a fresh final decision. Here also this Court observed that in case the Excise Commissioner, after remand, came to the conclusion that the classification of the petitioners' product was liable to be taxed as a toilet preparation, the Excise Commissioner would ignore the notional break-up and would allow the duty in accordance with the provisions of the Act. Thus legally, excise duty at 100 % ad valorem could not have been demanded as the Excise Officer would be constrained by the order dated 23.3.85 which held the field and had been issued by his superiors i.e. the Excise Commissioner, as well as by the aforesaid order of the Court. It was faintly suggested that the order dated 23.3.85 was ultimately dealt by the Apex Court in its Judgment dated 29.10.03 and held to be null and void and, therefore, was an order which was nonest in law. That since the said order of the Excise Commissioner dated 23.3.85 was declared as nonest and void by the Apex Court, the same cannot be treated to be a constraint on the Excise Officer for issuing a written demand for excise duty at 100 % ad valorem. The argument only requires to be stated to be rejected. The requirement of levy of short-duty due to inadvertence, error, collusion or misstatement on the part of an Excise Officer relates to a state of mind of the Officer on which future event would not have any bearing. In these circumstances, it cannot be said that the excise duty was short-levied through

inadvertence, error, collusion or misstatement on the part of the Excise Officer. The observations and rationale in the Judgment of the Apex Court, holding Rule 11 inapplicable to the earlier demand notices dated 13.3.91 and 15.5.91 continue to apply in full force to the demand notice dated 10.9.99 which is impugned in the present petition. We, therefore, find that Rule 12 and not Rule 11 would govern the demand notice dated 10.2.99.

10. It was then sought to be contended on behalf of the petitioners that even if Rule 12 was applicable, the Demand Notice dated 10.2.99 would be illegal as having been issued after an unreasonable period of time. Strong reliance was placed upon a Judgment of the Apex Court in the case of ***Government of India vs. Citedal Fine Pharmaceuticals,*** reported in 1989 (42) E.L.T. 515 (SC). In this Judgment, the Apex Court was considering the very same Rule i.e. Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 and observed as under :

> " **6. Learned counsel appearing for the respondent urged that Rule 12 is unreasonable and violative of Article 14 of the Constitution, as it does not provide for any period of limitation for the recovery of duty. He urged that in the absence of any prescribed period for recovery of duty as contemplated by Rule 12, the officer may act arbitrarily in recovering the amount after lapse of long period of time. We find no substance in the submission. While it is true that Rule 12 does not prescribe any period within which recovery of any duty as contemplated by the rule is to be made, but**

> **that by itself does not render the rule unreasonable or violative of Article 14 of the Constitution. In the absence of any period of limitation, it is settled that every authority is to exercise the power within a reasonable period. What would be reasonable period, would depend upon the facts of each case. Whenever question regarding the inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case."**

On the facts of this case, however, we do not find that there is any unreasonable delay on the part of the excise authorities to exercise its power under Rule 12. The facts indicate that the State Excise Commissioner finally decided that after shave lotions are "toilet preparations" vide his order dated 12.8.98 and that thereafter the Excise Authorities thought it proper to take liberty of this Court for issuing a demand notice. This liberty was granted in Writ Petition No. 337/98 on 15.9.98. Thereafter, the Excise Authorities studied the documents with a view to calculate the quantum of duties and ultimately issued a show cause notice dated 10.2.99 which enclosed their detailed calculations and after considering the petitioners' representation dated 24.2.1999 and giving the petitioners a personal hearing on 12.8.99 and 23.8.99, passed the impugned demand notice on 10.9.99. In view of the aforesaid, the time period of less than six months cannot be said to be an

unreasonable period for the exercise of power to effect recovery in the deficiency of duty under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956. Thus, the first two questions which pertain to the demand notices being vitiated as being hit by limitation or as having been issued after a unreasonable period of time, must be decided against the petitioners.

11. On behalf of the respondents, it was contended that the petitioners were guilty of approbation and reprobation and on this ground alone the petition deserved to be dismissed. It is their case that the petitioners obtained the benefit of paying lesser duty under the orders of the Court dated 22.8.91 passed in Writ Petition No.109/91, the order in terms of the minutes of order dated 24.9.91 passed in Writ Petition No.351/91 and lastly under the Judgment of this Court passed on 22.12.94, in Writ Petition No.84/92. That these benefits conferred by this Court in the aforesaid order were coupled with an obligation to pay enhanced liability according to law, if the after shave lotions were ultimately held to be "toilet preparations". It was contended that having enjoyed the benefits conferred by the aforesaid order of this Court, by this petition, the respondents were attempting to avoid the obligations of paying enhanced liability arising out of the declaration of their product as a toilet preparation. Reliance was placed on a Judgment of the Apex Court in the case

of ***Nagubai Ammal vs. B. Shama Rao,*** reported in AIR 56 SC 593 to indicate that the principle of "approbate & reprobate" was of a very wide application and applied to agreements, instruments and orders also. We were taken through the observations of the Apex Court as made in para 23 of the said Judgment. In reply, on behalf of the petitioners our attention was drawn to a Judgment of a Single Judge of the Bombay High Court in the case of ***Lakesh Chemical Works vs. M/s. Mehta, Collector of Customs (Preventive) Bombay and others,*** reported in 1981 E.L.T. 235(Bom.) wherein it was held that the principles of approbation & reprobation will apply to a person who takes advantage of the benefit but does not want to perform his obligation. It was contended that the principle of approbate/reprobate applied only to an agreement and would not apply to a legal plea of limitation. In our view, in the present case, the principle has no application as the petitioners' have not challenged their liability to pay enhanced excise duty as fastened by the earlier High Court Judgments/Orders but restrict therein challenge to the quantum and manner of calculating the said enhanced liability after the earlier remand by this Court.

12. This brings us to the fourth and last question relating to the method by which the excise duty leviable should be calculated. It is admitted by both sides before us that we must proceed on the footing that the petitioners

after shave lotions were toilet preparations within the meaning of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. It is further not in dispute that by virtue of Section 3 of the said Act, the excise duties have to be levied at the rates specified in the Schedule to the Act. Item No.4 of the Schedule deals with "toilet preparations" containing alcohol. It is an admitted position that after shave lotions contain alcohol. Under Item No.4, the duty which would be leviable, was 100 % ad valorem (which has been subsequently reduced to Rs.50/-). Explanation II to the said Schedule further provided as under :

> **"Explanation II. - Where any article is chargeable with duty at a rate dependent on the value of the article such value shall be deemed to be the value as determined in accordance with the provisions of Section 4 of the Central Excise and Salt Act, 1944 (1 of 1944)."**

Section 4 of the Central Excise Act, 1944 as it stood during the period of evaluation was in the following terms :

> " **4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where there under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this Section, be deemed to be -**
>
> **(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person**

and the price is the sole consideration for the sale :

(i) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different price to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers;

(ia) where the price at which such goods are ordinarily sold by the assessee is different for different places of removal, each such price shall, subject to the existence of other circumstances specified in clause (a) be deemed to be the normal price of such goods in relation to each such place of removal;

(ii) where such goods are sold by the assess in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;

(iii) where the assess so arranges that the goods are generally not sold by him in the course of wholesale except to or through a related person, the normal price of the goods sold by the assessee to or through such

related person shall be deemed to be the price at which they are ordinarily sold by related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail;

(b) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed.

(2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price.

(3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of Section 3.

(4) For the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) "place of removal"

(i) a factory or any other place or premises of production or manufacturer of the excisable goods;

(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such

goods are removed;

(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory and;

(ba) "time of removal" in respect of goods removed from the place of removal referred to in sub-clause (iii) of clause (b), shall be deemed to be the time at which such goods are cleared from the factory.

(c) "related persons" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the aesseee, and any sub-distributor of such distributor.

Explanation. - In this clause, "holding company", "subsidiary company" and "relative" have the same meanings as in the company Act, 1956 (1 of 1956)

(d) "value", in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assesee;

Explanation.- **In this sub-clause "packing" means the wrapper, container, bobbin, pirn, spool, reel to warp beam or any other thing in**

which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

Explanation.- For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods should be the sum total of -

(a) the effective duty of excise payable on such goods under this Act; and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in clause (a) or clause (b) shall be, -

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, [or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid] on the raw material or component parts used in the production or manufacture of such goods) from the duty of excise under such Act is for the time being

in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods]

(e) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements otherwise than in retail"

13. On a plain reading of Section 4, as it existed prior to its substitution in the year 2000, it is clear that the term "Value of excisable goods for purposes of charging of duty of excise" does not and cannot include any element of excise duty. This is clear from the heading of the section which clearly indicates that valuation of excisable goods is for the purposes of charging duty of excise. This is clarified by sub-Section 4(d) of Section 4, which provides that the value does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods. The value of the excisable goods is thus clearly "Ex-excise duty". Under Section 4(1), such value of goods is deemed to be the normal price thereof, that is to say the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. Since the value is deemed to be the

normal price of the goods, it is clear that the term "normal price of the goods" within the meaning of Section 4(1(a) also refers to normal price which is "Ex-excise duty". The method to be utilized by the Excise Authorities in arriving at value under Section 4 of the Central Excise Act, 1944 must, for the reasons that follow, clearly be as follows :

(a) In an ordinary case, where the documents/material maintained by the assessee or the statutory data as required to be kept/furnished by law indicate the price of the assessees goods and separately indicate the excise duty payable thereon, then the Excise Authorities may treat this as a value which is "Ex-excise duty" and may use this value (subject to their right of contending that the goods have been improperly undervalued) as the basis for making any deductions, permissible under law for arriving at the value to be used for calculation and quantification of excise duty payable by the assessee.

(b) However, when such documents/material do not indicate that the price at which the goods were sold by the assessee were ex-excise duty, then the Excise Authorities may, (subject to their right of contention that the goods have been improperly undervalued), treat the price shown by the assessee as a cum-excise duty and arrive at the value of the goods by the use of the formula as contained in the Judgment of the Apex Court in the case of ***Government of India vs. Madras Rubber Factory***. This formula clearly pertains to calculation of value of the goods only in cases where the sale price is cum-excise duty. This value must then be used for calculation and quantification of excise duty

payable by the assessee.

14. The method of calculating the excise duty was dealt with by the Apex Court in the case of ***Asst. Collector of Central Excise and ors. vs. Madras Rubber Factory Ltd., and others,*** reported in 1987 (27) E.L.T. 553. Para 22 of the said judgment related to the method of computation of assessable value in a cum-duty price at the factory gate sale. The observations in para 22 made by the Apex Court, were as under :

> " **22. The last important issue relates to the method of computation of assessable value in a cum-duty price at a factory gate sale. The issue is whether excise duty should be first deducted or the permissible deduction should be first deducted from the selling price for the reassessment before the Asst. Collectors. The assessment of the excise duty both in relation to Section 4 and in relation to the valuation rules is now subject to the definition contained in Section 4(4)(d) of the Excise Act. The value as defined thereunder is to be arrived at after the cost of packaging of durable nature or a returnable nature as also amounts of duty of excise, sales tax and other taxes and trade discount allowed in accordance with the normal practice of wholesale rate is determined. It is thus implicit that no excise duty is payable on an element of excise duty in the price. The value as contemplated under Section 4 cannot include a component of excise duty. In the circumstances, where the computation of an assessable value has to be made from the factor, gate sale price which is a cum-duty price, the first question which will have to be addressed is what are the exclusions and permissible deductions from such a sale price. The petitioners have contended that their cum-duty price was arrived at after calculating and adding excise duty payable i.e. before actually duty was paid. They contend that their price list for several articles is approved much in advance of the removal from the**

factory. They contend that when the assessable value is to be arrived at, the same amount of excise duty which was predetermined and added to the factory price is naturally to be deducted first and only thereafter the permissible deductions should be deducted to arrive at the value. For the purposes of argument, MRF submitted the following example for consideration :

They suggested that their selling price should be considered (cum-duty selling price) as Rs.3200/-. They further submitted that the permissible deductions whether on account of trade discount or on account of cost of secondary packaging or sales tax or other taxes packaging or sales tax or other taxes should hypothetically be considered at Rs.200/-. The rate of excise duty chargeable is 60 % ad valorem for automotive tyres. Assuming for the sake of argument that the value of the product is actually Rs.2075/-. In accordance with the provisions of Section 4(4)(d) permissible deductions are made. The assessable value would be Rs.1875/- being the difference of Rs.2075/- and Rs.200/-. Excise duty at the rate of 60 % would thereafter be computed on the sum of Rs.1875/- and would aggregate Rs.1125/-. The selling price which is a cum-duty price would be the sum total of the assessable value, the permissible deductions and the excise duty. Putting this as a mathematical formula, the selling price (cum-duty price) is equal to assessable value plus permissible deductions plus excise duty. Cum-duty paid selling price = Assessable value + Excise Duty + Permissible deductions. Again excise duty is a computed has a ration of the assessable value where duty is ad valorem. For the purposes of ascertaining of the assessable value, if three of the components namely, the cum-duty selling price, the quantum of permissible deductions and the rate of excise duty are known, the proper and appropriate method of determining the assessable value would be the following formula :

Assessable value = cum-duty selling price – permissible deductions (divided by) (1+ Rate of excise duty)

Thus in the instant case working backward, if the cum-duty selling price is known to be Rs.3200/- and the permissible deductions are known to be Rs.200/- and the rate of excise duty is known to be 60 %, the assessable value is computed as under :

Selling price – permissible deductions 3200 – Rs. = Rs.3000.

Assessable value is equal to difference in selling price and permissible deductions divided by 1 plus 60/100 which is equal to 3000/1.6 which is equal to Rs.1875/-. The excise duty at 60 % ad valorem rate would be Rs.1125/- on the assessable value of Rs.1875/-.

The mathematical formula enumerated above balances. For example, if the cum-duty paid selling price is equal to Rs.3200/- , the assessable value is Rs.1875/- excise duty is Rs.1125/- and permissible deduction is Rs.200/-, the aggregate of the assessable value, the permissible deduction and the excise duty is equal to the selling price (cum-duty paid).)

Any other method of computation of excise duty or assessable value is erroneous. The petitioners basis that the assessable value is to be arrived at by taking into consideration the same amount of excise duty which was hypothetically pre-determined and added to the factory price and that this element is an attempt to compute the assessable value should naturally be deducted first, is putting the cart before the horse. The excise duty is only known as a ratio of the assessable value when an ad valorem duty is included in the cum-duty paid selling price. The quantum of excise duty cannot be pre-deducted or pre-determined till the assessable value is known. It is only the permissible deductions in concrete monetary terms and amount which are known. The cum-duty paid sale price being available for computation and a known value of deductions permitted being also known, the assessable value and the excise duty as a ratio of the assessable value can be only decided by first deducting the permissible deductions, from the cum-duty paid selling price and thereafter computing the value in accordance with the equation mentioned above. This has both a legal and a mathematical basis. If the pre-determined amount of excise duty as per

the illustration given by MRF Ltd. is first deducted, the equation will not tally. For example, if from a hypothetical cum-duty price of Rs.150/- (comprised of the value of the product at Rs.100/- and ad valorem excise duty @ 50 % at Rs.50/-), if the excise duty of Rs.50/- is first deducted and thereafter the permissible deduction of Rs.5/- is deducted, the assessable value arrived at would be Rs.95/-. The rate of excise duty is 50 % and the excise duty @ 50 % of the assessable value of Rs.95/- would be Rs.47.50 and not Rs.50/- as earlier deducted. There would be constant difference of Rs.2.50 in the computation. It is, therefore, an incorrect method of evaluating the assessable value in instances of cum-duty selling price. This interpretation is borne out by the definition contained in Section 4(4)(d) of the Excise Act. MRF's contention that the excise duty should be deducted first and then the permissible deductions is incorrect. In ordinary cases where the factory price is not a cum-duty price, the first step in arriving at the assessable value is to deduct the permissible deduction and thereafter to compute the excise on an ad valorem basis. The excise duty cannot be computed unless the permissible deductions are first made. The assessable value is arrived at only after the permissible deductions are made. Excise duty is a ratio of the assessable value. Ad valorem excise duty is computed only on assessable value after arriving at such assessable value by making proper permissible deductions. Excise duty cannot be computed without proper determination of the assessable value, namely assessable value exclusive of permissible deductions. Even in the cum-duty sale price, the same principle must be followed to arrive at the assessable value. To compute an excise duty as a pre-determined amount without making the permissible deductions for reducing the cum-duty selling price is a fallacy both legally and mathematically as demonstrated above. The ad valorem excise duty can only be computed after reducing the assessable value by permissible deductions and then applying the tariff rate to the assessable value. To reverse this sequence is to misinterpret the scheme and mode of levy of excise

duty on the assessable value." (underlining provided).

15. On reading the aforesaid observations, it is absolutely clear that the Supreme Court made a distinction between the ordinary cases where factory price was not cum-duty and other cases were factory price was cum-duty. In no uncertain terms the Supreme Court laid down that the ratio that in ordinary cases where the factory price is not cum-duty price, the first step in arriving at the assessable value is to deduct the permissible deduction and thereafter to c**ompute the excise on an ad valorem basis** (emphasis provided). Emphasis by underlining has been given to these observations of the Apex Court in para 22 by us while reproducing para 22 hereinabove. The mathematical formula arrived at by the Apex Court clearly does not govern ordinary cases where factory price is not cum-duty price. In a subsequent Judgment of the Apex Court in the case of ***Government of India vs. Madras Rubber Factory Ltd.,*** reported in 1995 (77) E.L.T. 433, the Apex Court in para 67, reproduced para 22 of its earlier Judgment as quoted hereinabove and agreed with the method of computation of assessable value when the sale price was cum-duty as indicated in para 22 of its earlier Judgment of ***Asst. Collector of Central Excise and others vs. MRF Limited and others (***supra).

16. In the present case, it is vehemently contended by the petitioners

that the value of the goods as shown by them is cum-duty. This contention must be rejected on the basis of the documents maintained and furnished by the petitioners i.e. their invoices and AR-2 Forms. The Excise Authorities produced before this Court a few invoices of the petitioners. Two of these can be found annexed to a copy of the affidavit filed on behalf of the respondents in Writ Petition No. 84/92 which affidavit is annexed to the affidavit in reply dated 26.9.05 filed on behalf of the State of Goa in the present petition. The genuineness of both these invoices have not been denied at any stage by the petitioners. It is not their case that such invoices were not issued by them. A bare glance at these invoices indicates that the price of the goods as shown in these invoices is Ex-excise duty. This is clear because the excise duty has been shown in addition to the value and has been added to the price of goods while arriving at the total. Annexed to the affidavit (at page 580) is yet another invoice which also shows the net value of the goods sold under the caption "net total price". Here also the said excise duty is calculated under a separate column albeit at a lesser rate, but has been added to the value as shown under the caption "net total price" to arrive at the total sale price of the goods shown in the invoice. As relating to this very same transaction, the corresponding AR-2 form is also produced by the Excise Authorities (at page 579) and this also clearly shows that the same amount as shown under the caption "net total price" in the invoice, is the same shown as the value in the

AR-2 forms and the excise duty has been calculated by the petitioners themselves as being in addition to the value so shown. The value as shown in the AR-2 form as well as in the invoices, is given by the petitioners themselves. The invoices are signed by the Accounts Executive of the petitioners and the AR-2 forms appear to have been signed by the Project Manager. These documents furnished by the petitioners leave no manner of doubt whatsoever that the net total price as indicated in the invoices which are the same as the value of the goods as mentioned in the AR-2 forms, are both Ex-excise duty. It is also clear that the authorities have accepted this value as Ex-excise duty. Both the parties are in agreement that there are no deductions required to be made and in the circumstances, the Excise Authorities having accepted this value, have calculated the excise duty as 100 % ad valorem on the accepted value as declared by the petitioners themselves. Having shown the excise duty payable as an additional separate factor in the invoices as well as in the Form AR-2, there is no scope to conclude that N.T.P. as shown in the invoices which corresponds to the value as shown in the AR-2 Form is a cum-duty price.

17. Once it is held to be the factual position, the only possible conclusion that can be drawn from the documents maintained/furnished by the petitioners is that the price of the goods as shown by them is a Ex-excise

duty price and not cum-duty price, then in our view, the question of applying any formula to arrive at assessable value of the goods on the basis of the cum-duty price does not arise. The petitioners placed strong reliance on a Judgment of a larger Bench of CEGAT, in the case of ***Srichakra Tyres Ltd. vs. Collector of Central Excise, Madras,*** reported in 1999 (108) E.L.T. 361 (Tribunal) which was not interfered with by the Apex Court when challenged. They also placed reliance on the Judgment of the Apex Court in the case of ***Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd.,*** reported in 2002(141) E.L.T. 3 (S.C.). Lastly, it was brought to our notice that the ratios as laid down in S***richakra Tyres Ltd. vs. Collector of Central Excise, Madras (supra)*** and ***Commissioner of Central Excise, Delhi vs. Maruti Udyog Ltd.*** were followed by several Benches of the Excise Tribunal. Our attention was drawn to the Judgment of the CESTAT, South Zonal Bench, Chennai, in the case of ***Gold Plast vs. Commissioner of Central Excise, Coimbatore.,*** reported in 2005 (185) E.L.T. 37 (Tri. Chennai). In our view, the ratio as laid down in these Judgments was that the price at which the goods were actually sold by the assessees in these cases should be taken as the cum-excise duty price. In none of these cases, the "Ex-Excise duty"price was before the Court. Our attention is also drawn to an explanation to Section 4(i) inserted by Act 32 of 2003 with effect from 14.5.2003 which is in the following terms :

> **"Explanation – For the removal of doubts, it is hereby declared that the price-cum-duty of the**

> **excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods."**

18. In our view, the aforesaid Judgments and the explanation cited, can have no application where the Ex-excise duty price of the goods is contained in the petitioners' documents or in the documents available with the Excise Authorities. If ex-excise duty price is available with the Excise Authorities, there is no question of treating this as the cum-duty price. In the cases which are cited in para 16 hereinabove, the ex-excise duty price was never furnished to the authorities. It was in these circumstances that the price as shown by the assessees for sale of the their goods was treated as cum-duty price.

19. It was then contended before us that in the Judgment of the Division Bench of this Court dated 1.4.99 passed in Writ Petition No.337/98 in respect of the earlier demand notices dated 13.3.91 and 15.5.91, this Court had directed the calculation of differential duty based upon the Supreme Court Judgment in the case of ***Government of India vs. Madras Rubber Factory Limited*** (supra). A glance at that Judgment indicates that in para 44, the

Court proceeded to conclude that the price was cum-duty on the basis of the price list approved by the Excise Commissioner by his letter dated 3.10.89 wherein the price was fixed inclusive of duty (cum-excise duty). The Court concluded that the price inclusive duty was shown for the purpose of assessment and, therefore, this price was required to be taken as cum-duty price. It is in this background that the Court directed that the assessable value of the goods should be arrived at by application of formula in the MRF cases. In the notice impugned in this petition, however, we find that actual documentation is available. This documentation shows a price which is lower than as shown as cum-duty price in the letter of the Excise Commissioner dated 3.10.89. This is another factor to indicate that the value as shown in the invoices as well as AR-2 forms furnished by the petitioners is an Ex-duty price, being lesser than cum-duty price of the same product as shown in the Excise Commissioner's letter dated 3.10.89. The calculation as made by the Excise Authorities is on the basis of actual sale invoices of the petitioners themselves and AR-2 Forms furnished by them. In our view, therefore, the finding of this Court relating to the earlier period will not help the petitioners. It may be mentioned here that in a subsequent Judgment of this Court dated 3.11.2004 between the same parties passed by a Division Bench in Writ Petition No.324/91, this Court while remanding the matter for calculation of quantification under the very demand notice impugned in this

petition, clearly rejected the petitioners' contention relating to automatic applicability of the formula laid down in ***Government of India vs. Madras Rubber Factory Limited*** (supra) by making the following observations :

> **"We are not impressed with the contentions of the petitioners that the quantification in this case is also required to be undertaken by following the same formula suo motu. The petitioners will have to appear before the appropriate authority and on the basis of the record that may be available with them the issue of cum-duty price will have to be settled.**

20. We thus find that the Excise Authorities have issued the demand notice on the basis of ex-excise duty value/price as furnished by the petitioners themselves. Admittedly, there are to be no deductions. They have added 100 % ad valorem to arrive at the duty payable. We find that there is no error in the quantification of the short excise duty payable by the petitioners and that the same has been calculated on a correct legal basis.

21. In the result, therefore, we dismiss the petition with costs, which are quantified at Rs.15,000/-.

22. Advocate for the petitioners applies for a certificate, certifying fitness to file an appeal before the Apex Court under Article 133 of the Constitution. In our view, there is no substantial question of law involved in the petition. Hence, the certificate is refused. The petitioners orally apply for

grant of stay of the operation of this Judgment. Advocate appearing for the respondents makes a statement that the impugned order dated 11.6.2005 will not be implemented for a period of four weeks. The statement is accepted.

R.S. MOHITE, J.

N. A. BRITTO, J.

ssm.